

AVAILABILITY OF DOCUMENTS ADDED TO RULEMAKING FILE

NOTICE IS HEREBY GIVEN that the following document is being added to the rulemaking record for the regulatory proceeding concerning sections 1399.650, 1399.700, 1399.701, 1399.702, 1399.703, 1399.704, 1399.705, 1399.706, and 1399.707 of Title 16 Cal. Code Reg:

1. Initial Statement of Reasons (AMENDED)

The above document is now available for public inspection and/or comment until July 29, 2003 at the following location

Mischa Matsunami
Board of Podiatric Medicine
1420 Howe Ave., Suite #8
Sacramento, CA 95825

DATED: July 7, 2003

James H. Rathlesberger
Executive Officer
Board of Podiatric Medicine

**BOARD OF PODIATRIC MEDICINE
INFORMATION DISCLOSURE REGULATIONS
INITIAL STATEMENT OF REASONS
(AMENDED)**

Hearing Date: June 6, 2003

Subject Matter of Proposed Regulations: Information Disclosure

Section(s) Affected:

Division 13.9 of Title 16, Information Disclosure

Amend Sections 1399.650; 1399.700 (renumbered); 1399.705 (renumbered)
Add Sections 1399.700; 1399.701; 1399.702; 1399.703; 1399.704; 1399.705; 1399.706;
1399.707

Specific Purpose of each adoption, amendment, or repeal:

1. Amend Section 1399.650. Citation:

Existing regulation refers to the body of Division 13.9 of Title 16 of the California Code of regulations as "This chapter."

This proposal would change this reference to "This division" to be consistent with the organization of these regulations.

2. Add Section 1399.700

This proposal would add to the Board's regulations, a section which expresses the overall goal of the Board to permit maximum information access to consumers and members of the public consistent with statutory and constitutional law.

3. Add Section 1399.701

The addition of this section to the Board's regulations was mandated by SB 1950 in 2002, and requires the Board to adopt regulations defining the status of a licensee by January 1, 2004. This designated status will be used either in response to public inquiries, or, in posting information on its website regarding doctors of podiatric medicine.

4. Add Section 1399.702:

The addition of this section to the Board's regulations was mandated by SB 1950 in 2002, and requires the Board to "develop standard terminology that accurately describes [certain] types of disciplinary filings and actions."

5. Amend Section 1399.700:

Existing regulation defines the types of information that the Board will disclose (if known) regarding any doctor of podiatric medicine licensed in California.

This proposal would renumber this section to be consistent with Article 9 regulations in accordance with the proposed additions contained in this notice (change to 1399.703).

This proposal would also make changes to the following subdivisions:

Subdivision (b) – Proposed changes are primarily for the purposes of clarification to fill in gaps in the types of disciplinary actions taken against a doctor of podiatric medicine that will be disclosed.

Subdivision (c) – Existing subdivision (c) requiring the disclosure of medical malpractice judgments in excess of \$30,000 was deleted because it has been replaced and expanded by new subdivision (d). Medical malpractice judgments in any amount will now be reported regardless of whether reversed on appeal. This information will be accompanied by a disclaimer which states any judgment is subject to appeal and reversal by a higher court. The Board believes this expanded disclosure requirement is consistent with the policy of providing maximum amount of information permissible for purposes of consumer protection. The latter portion of old subdivision (b) was redesignated as subdivision (c).

Subdivision (d) – Old subdivision (d) was deleted because it is redundant with subdivision (b) as modified.

Subdivision (e) – New subdivision (e) regarding disclosure of arbitration awards is consistent with new language added to Section 803.1 by SB 1950.

Subdivision (f) - Old subdivision (e) was redesignated as subdivision (f).

Subdivision (g) – New subdivision (g) regarding disciplinary actions taken at a hospital or other type of health care facility is consistent with language in Business and Professions Code Section 2027. It requires postings on the internet of disciplinary actions taken at hospitals against physicians and surgeons resulting in a loss of staff privileges.

Subdivision (h) – New subdivision (h) adds a requirement regarding disclosure of referrals to the Attorney General for purposes of disciplinary action. It would permit the Board to disclose the referral of a matter to the Attorney General for the filing of a disciplinary action against a doctor of podiatric medicine.

6. Add Section 1399.704:

This section is consistent with the Board's overall policy of maximizing disclosure to the public, and will require the release of information concerning past or pending complaints against a doctor of podiatric medicine. These complaints will only be disclosed if they have resulted in a referral to the Attorney General or a formal legal action. Complaints found to be without merit or that result in no legal action being taken following a referral will be dropped from the Board's disclosure system. A disclaimer will accompany disclosure of complaints that have resulted in a referral. Finally, to protect the privacy rights of the complainant, information that would identify or lead to his or her identification will not be disclosed.

7. Add Section 1399.705:

The addition of this section to the Board's regulations was mandated by SB 1950 in 2002, which, in accordance with Section 803.1 of the Business and Professions Code, places restrictions on the types of information that can be disclosed with respect to settlement of civil cases involving professional malpractice of physicians and surgeons and doctors of podiatric and osteopathic medicine.

8. Add Section 1399.706:

In accordance with Section 2027 of the Business and Professions Code and Section 1399.703 of these regulations, this regulation would describe parameters for the disclosure of information on the Board's website concerning licensed doctors of podiatric medicine.

9. Amend Section 1399.705:

This proposal would renumber this section to be consistent with the proposed changes and additions contained in the proposed language under Article 9 (change to 1399.707).

Background

The Public Records Act (Govt. Code § 6250 et seq.) provides that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." This Act also provides that the public has a right to inspect public records unless they are exempted from mandatory disclosure by express provisions of law. (Govt. Code § 6253(b).)

In addition to the Public Records Act, Business and Professions Code Sections 803 and 803.1 mandate that the Board of Podiatric Medicine ("the Board") either disclose or withhold certain categories of information pertaining to doctors of podiatric medicine. These sections were modified by SB 1950 in 2002. The new legislation also requires the Board to adopt regulations pertaining to the type of information it discloses.

Accordingly, the Board proposes to modify its existing regulations governing the disclosure of information pertaining to the professional status of doctors of podiatric medicine. In proposing these regulations, the goal of the Board is to provide maximum disclosure to the public consistent with governing statutory and constitutional law.

Relationship of the Public Records Act and Business & Professions Code Sections 803 and 803.1

The Public Records Act requires state agencies to disclose public records in their possession unless specifically exempted. Exempted records *may*, but need not be disclosed. By contrast, Business and Professions Code Sections 803 and 803.1 identify categories of information concerning licensed health care professionals which must either be disclosed or withheld. Even though a particular item of information may not be covered by sections 803 or 803.1, the Board must still determine whether its disclosure is independently required by the Public Records Act.

For example, Section 803.1 mandates the disclosure of malpractice judgments *not reversed* on appeal. The Board, however, may also be in possession of information or documents concerning judgments that *were* reversed. The reversal of the judgment does not suddenly make this information non-public. Therefore, disclosure would still be required under the Public Records Act.

Information pertaining to the professional status of doctors of podiatric medicine would normally be a matter of public nature and thus disclosure would be required under the Public Records Act. There are, however, exceptions. Matters of impacting the privacy rights of the licensed professional such as Social Security Numbers, home address and telephone numbers would not be disclosed to the public.

Using these statutory and constitutional principles, the Board proposes to adopt the following regulations which would govern information disclosures to the public.

Section 1399.650 - Manner of Citation.

The regulations of the Board are contained in Division 13.9 of Title 16 of the California Code of Regulations. Section 1399.650 currently refers to the body of these regulations as “This chapter.” To be consistent with the organization of the regulations, this reference has been changed to “This division.”

Section 1399.700 - Statement of Policy.

This new section expresses the overall goal of the Board to permit maximum information access

for consumers and members of the public consistent with controlling statutory and constitutional law.

Section 1399.701 - Status of Licensees.

This new section was mandated by SB 1950. It requires the Board to adopt regulations defining the status of a licensee by January 1, 2004. It was drafted to include a licensee within the “good standing” category unless his or her practice is subject to some type of restriction or limitation as a result of a settlement, judicial or administrative order or because of a suspension following a conviction of certain crimes or an incarceration following conviction of a felony. In addition, if the doctor of podiatric medicine objects because of non-inclusion in the “good standing” category, he or she will have the right to challenge this designation at an administrative hearing.

Section 1399.702 - Standard Terminology Describing Different Types of Disciplinary Actions

This regulation is also mandated by SB 1950. It requires the Board to “develop standard terminology that accurately describes [certain] types of disciplinary filings and actions.” In formulating this terminology, the Board gave a basic explanation of each type of action, the procedures involved, and when each can be utilized.

Section 1399.703 - Requirements for Information Disclosure.

This proposed regulation is a modified version of existing Section 1399.700. The changes made in subdivision (b) are primarily for purposes of clarification of to fill in gaps in the types of disciplinary actions taken against a doctor of podiatric medicine that will be disclosed.

Existing subdivision (c) requiring the disclosure of medical malpractice judgments in excess of \$30,000 was deleted because it has been replaced and expanded by new subdivision (d). Medical malpractice judgments in any amount will now be reported regardless of whether reversed on appeal. This information will be accompanied by a disclaimer which states any judgment is subject to appeal and reversal by a higher court. The Board believes this expanded disclosure requirement is consistent with the policy of providing maximum amount of information permissible for purposes of consumer protection.

Old subdivision (d) was deleted because it is redundant with subdivision (b) as modified.

New subdivision (e) regarding disclosure of arbitration awards is consistent with new language added to Section 803.1 by SB 1950.

Old subdivision (e) was redesignated as subdivision (f).

New subdivision (g) regarding disciplinary actions taken at a hospital or other type of health care facility is consistent with language in Business and Professions Code Section 2027. It requires postings on the internet of disciplinary actions taken at hospitals against physicians and surgeons resulting in a loss of staff privileges.

1399.703(h) - Disclosure of Referrals to the Attorney General

Section 1399.703(h) adds a requirement regarding disclosure of referrals to the Attorney General for purposes of disciplinary action. It would permit the Board to disclose the referral of a matter to the Attorney General for the filing of a disciplinary action against a doctor of podiatric medicine. In the past, objections have been raised against disclosure of referrals to the Attorney General. They have centered on possible violation of the individual's privacy and due process rights. The Board believes these objections to be without merit for the following reasons.

1) Privacy

Information disclosed about a licensed professional normally does not concern his or her private life. Rather, it primarily relates to his or her professional competence and qualifications as a licensee of the State. Such information should not be shielded from public scrutiny, particularly on the ground that it impacts the individual's right to privacy.

In *Board of Medical Quality Assurance v. Andrews*, 211 Cal. App. 3d 1346, 1359, 260 Cal. Rptr. 113 (1989), the court observed that:

“The right of an individual to privacy does not encompass any right to diagnose or treat other individuals.”

Likewise, in *Cohen v. Marx*, 94 Cal. App. 2d 704, 705, 211 P.2d 320 (1949), the court noted that:

“A person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy.”

Based on this authority, the Board does not believe that disclosure of referrals to the Attorney General for possible disciplinary action violates the right of privacy of any licensed doctor of podiatric medicine.

2) Procedural Due Process

Disclosure of a referral to the Attorney General's office could affect the reputation interest of the licensed professional. It would not, however, directly impact his or her property interest. Nor

would it constitute action by the State which would foreclose the ability of the individual to practice his or her profession. That could only occur after a license revocation following an administrative or judicial hearing.

Earlier U.S. Supreme Court cases such as *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), if read in a vacuum, might support the argument that mere damage to reputation triggers a due process interest. But the Supreme Court limited these apparent holdings in the seminal case of *Paul v. Davis*, 424 U.S. 693 (1976). It noted that:

“Two things appear from [this] line of cases The Court has recognized the serious damage that could be inflicted by branding a government employee as ‘disloyal’ and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment.” (p. 705.)

Rather, the Court noted it was the ***altered legal status*** accompanying the defamatory statements which justified the invocation of procedural safeguards. (p. 707. In *Constantineau*, it was the inability to transact business in local liquor stores.)

The Court then concluded that:

“In each of these cases [i.e. *Constantineau*, etc.] . . . a right or status previously recognized by state law was distinctly altered or extinguished. It was this alternation, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the ‘liberty’ or ‘property’ recognized in those decisions. . . . And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of and ‘liberty’ or ‘property’ recognized by state or federal law, nor has it worked any change of respondent’s status as theretofore recognized under the State’s laws. For these reasons we hold that the interest in reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.” (424 U.S. at 711 - 13.)

California state courts are in accord with their federal counterparts. In *Haight v. City of San Diego*, 228 Cal. App. 3d 413, 418, 278 Cal. Rptr. 334 (1991), the court noted that:

“It is well established ‘[a] person’s protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. . . . Rather, the liberty interest is infringed only when the

defamation is made in connection with the loss of a government benefit, such as employment.” (Quoting *Murden v. County of Sacramento*, 160 Cal. App. 3d 302, 308, 206 Cal. Rptr. 699 (1984).)

In addition, even if the damage to reputation adversely impacted the individual’s business, this would still not be sufficient to trigger procedural due process rights. (*WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 375 (9th Cir. 1999) (en banc).)

Based on this federal and state case authority, the Board has determined that even if disclosure of a referral adversely impacted the reputation of a doctor of podiatric medicine, this would not constitute a violation of his or her due process rights. In addition, to minimize these risks in the first instance, a disclaimer will be required to accompany such disclosures. It notes that the matter has only been referred following a completed investigation, that the doctor of podiatric medicine will have the right to defend himself or herself against any charges at a hearing before an independent administrative law judge. Finally, if a hearing is conducted, the Board has the ultimate burden of establishing the truth of these charges before any disciplinary action can be taken.

1399.704 - Disclosure of Complaints.

Consistent with the Board’s overall policy of maximizing disclosure to the public, this Section will require release of information concerning past or pending complaints against a doctor of podiatric medicine. Again, only complaints will be disclosed if they have resulted in a referral to the Attorney General or a formal legal action. Complaints found to be without merit or that result in no legal action being taken following a referral will be dropped from the Board’s disclosure system. A disclaimer will accompany disclosure of complaints that have resulted in a referral. Finally, to protect the privacy rights of the complainant, information that would identify or lead to his or her identification will not be disclosed.

1399.705 - Disclosure of Civil Settlements.

Business and Professions Code Section 803.1 as modified by SB 1950 places restrictions on the type of information that can be disclosed with respect to settlement of civil cases involving professional malpractice of physicians and surgeons and doctors of podiatric and osteopathic medicine. The Medical Board is required by SB 1950 to develop “high or low risk” categories for these professionals depending on the nature of their practice. The number of settlements which can be reported for a given time period is then made dependant on the risk category assigned. Certain types of settlements are excluded from these mandatory disclosure rules. Although the dollar amount of the settlement cannot be disclosed, SB 1950 mandates that these amounts be placed in three statistical categories based on the average number in the doctor’s specialty. (I.e. Below or above average and average.) Further complicating the process is the rather lengthy mandatory disclaimer which must accompany such disclosures. Its general thrust

is to suggest to the public that the existence of malpractice settlements should not by itself be interpreted to reflect adversely on the competence of the particular professional.

Although the Board does not entirely agree with the underlying philosophy which apparently motivated these statutory changes, it has no discretion but to follow these mandates at the present time with respect to disclosure of malpractice settlements involving doctors of podiatric medicine.

1399.706 - Disclosure of Information on Board's Website

This regulation would contain basic information describing the status and qualifications of each licensed doctor of podiatric medicine, including whether or not he or she is in "good standing."

Underlying Data

None

Business Impact

This regulation will not have a significant adverse economic impact on businesses.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulations would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.